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# Reviews

EdinLR Vol 10 pp 453-454

**David Carey Miller with David Irvine, CORPOREAL MOVEABLES IN SCOTS LAW.**

Edinburgh: Scottish Universities Law Institute, W Green & Son Ltd ([www.wgreen.co.uk](http://www.wgreen.co.uk)), 2nd edn, 2005. xlii + 367 pp. ISBN 0414014006. £145.

The first edition of this magisterial work appeared in 1991. Much has happened in Scottish property law since then. The abolition of the feudal system by the new Scottish Parliament and a significant number of other statutory developments, for example the Land Reform (Scotland) Act 2003 come to mind. On closer examination, however, these changes overwhelmingly relate to land law. It is a more difficult task to think of developments in the law of corporeal moveables. The case of *Chief Constable of Strathclyde v Sharp* 2002 SLT (Sh Ct) 95, about a Porsche in Glasgow, is of less moment than its partial namesake *Sharp v Thomson* 1997 SC (HL) 66 about, it need hardly be said, a flat in Aberdeen. Without a doubt, however, this new edition is both timely and welcome. As the preface notes, “[t]he most significant single form of new material . . . is juristic literature.” The past fourteen years have seen much light shed into the dark repositories of Scottish property law, as well as an increasing amount of comparative research. The authors are to be commended for their meticulous work in drawing on this in their book. It is noticeable too that they make reference to texts on heritable property, underlining the new acceptance of property law as a unitary subject, a notable development since the date of the first edition.

The structure of the original work is retained, with the same twelve chapter titles, but the book is just over 50 pages longer. This increase is primarily due to the references to the new scholarly work already mentioned. There are, however, some specific additions worthy of comment. The first chapter, which contains a general overview of corporeal moveables law, now concludes with a discussion of the relevance of the European Convention on Human Rights, which has become directly enforceable in the Scottish courts. This is appropriately brief given the lack of case law to date. An arguable omission is the question of the extent to which Convention rights can be enforced in cases between private individuals, i.e. the issue of “horizontal effect”.

Chapters 2, 3, 4 and 5 deal, respectively, with the original acquisition doctrines of occupation, accession, specification, and confusion/commixtion. These of course are heavily based on Roman law. In the first edition (at 70) it is stated that good faith should not play a role in determining whether a title is acquired by specification. This view is modified in the second edition (at 91) where the authors suggest that a Scottish court could decide that good faith is a pre-requisite. This may well be true, but, on balance, this reviewer prefers the issue to be germane to compensation rather than have a proprietary effect.

Chapter 6 treats acquisition of fruits. The discussion of when possession is in good faith is of particular value, with an interesting reference to the website of the Art Loss Register (at 103). Chapter 7, on prescription, takes account of David Johnston’s *Prescription and Limitation* (1999), a major development since the first edition. The authors rightly maintain the conclusion that there is no clear authority supporting a common law doctrine of acquisitive prescription in relation to corporeal moveables.

In chapter 8, the subject is derivative acquisition at common law. The treatment is significantly more extended than that in the first edition. In relation to the need for delivery as an act to publicise transfer, reference is made to the important House of Lords decision in relation to land in *Burnett’s Trustee v Grainger* 2004 SC (HL) 19. There are entirely new sections on void

and voidable titles (150-151); the role of good faith (173-182), and accretion (182). The second of these contains a valuable discussion of the so-called "rule against offside goals", which is exemplified in the land law case of *Rodger (Builders) Ltd v Fawdry* 1950 SC 483, but in principle must apply to moveables too. Thus far *Marshall v Hynd* (1828) 6 S 384, which concerns timber, appears to be the only case. Chapter 9 scrutinises transfer under the Sale of Goods Act 1979, a subject upon which Professor Carey Miller has written influentially elsewhere since the first edition of his book. His thesis, that the introduction of the sale of goods legislation to Scotland did not do as much damage to the underlying Civilian principles of transfer as others, notably Sir Thomas Smith, have argued, is a cogent one.

Chapter 10 gives a comprehensive account of the protection of the right of ownership. It concludes with an examination of *spuilzie*, the remedy for recovery of possession, now little used. Chapter 11 considers security and is a particularly good example of the authors drawing effectively on recent academic work. Proper notice is taken of the limited amount of new case law. For example, it is suggested, correctly, that moveable security requires to take account of the decision of the House of Lords in *Smith v Bank of Scotland* 1997 SC (HL) 111 in relation to contracting in good faith. The final chapter of the book considers reservation of title, a subject which attracted more cases in the 1970s and 1980s than it has done recently. There is a helpful discussion of the enforceability of trust clauses in this context.

This book was published during the final academic year prior to Professor Carey Miller's retirement from the University of Aberdeen. His contribution to property law in Scotland, as well as South Africa, has been an outstanding one and the book is an excellent note on which to conclude his full time career. David Irvine, the co-author for this second edition, who was formerly Professor Carey Miller's research assistant and is now a trainee solicitor, clearly has a bright future ahead of him. Their work is a worthy addition to the Scottish Universities Law Institute series.

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**THE NEED FOR A EUROPEAN CONTRACT CODE. Ed by Jan Smits.**

Groningen: Europa Law Publishing ([www.europalawpublishing.com](http://www.europalawpublishing.com)), 2005.

xii + 188 pp. ISBN 9076871353. €42

This is an interesting book on an important question. What would be the costs and benefits of a unified European contract law? It is true that that particular question is not currently on the political agenda. The focus of the European Commission is now on the development of a so-called Common Frame of Reference which might serve as a sort of toolbox for the improvement of European legislation on private law topics (bringing some much-needed consistency of terminology) and, possibly, as an optional instrument which contracting parties might choose for the regulation of their contractual relationship. Nonetheless the question of a European contract code is worthy of consideration. It is considered in this book from the point of view of law and economics, law and the psychology of decision making, and law and sociology.

The book consists of chapters by Gerhard Wagner, Helmut Wagner, Jaap Hage, Heico Kerkmeeester, Jeffrey Rachlinski, Thomas Wilhelmsson and Jan Smits. The authors are all extremely well-informed. They have thought deeply about the issues and in many cases have written extensively about them elsewhere. They offer a careful and well-balanced assessment and they write well.

The general conclusion to emerge is that the authors are rather sceptical as to the desirability of proceeding directly to a legislated unified European contract law but some are in favour of